85-1548

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No.

GENE FLINN,

Petitioner,

vs.

ELAINE GORDON,

Respondent.

* * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

* * * * * * * * * * * * * * * *

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER DISMISSAL OF A CIVIL RIGHTS COMPLAINT PURSUANT TO 42 U.S.C. § 1983 PREDICATED UPON A BARE ALLEGATION OF QUALIFIED IMMUNITY IS APPROPRIATE WHEN THE DEFAMATORY REMARKS MADE THROUGH THE MEDIA VIOLATE KNOWN CONSTITUTIONAL RIGHTS OF A LAWYER/LEGISLATOR IN HIS PROFESSIONAL CAREER AND AS A FAMILY MAN?

EDITOR'S NOTE

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PREFACE

The Petitioner, GENE FLINN, was the Appellee in the United States Court of Appeals for the Eleventh Circuit and the Plaintiff in the United States District Court of the Southern District of Florida. Respondent, ELAINE GORDON, was the Appellant in the Eleventh Circuit and the Defendant in the Southern District Court. In this brief, the parties will be referred to as Petitioner and Respondent or, alternatively, by proper name.

The symbol "App" will be used to designate the Appendix which contains the revelant portions of the record to show jurisdiction to this Court.

I

OPINIONS BELOW

1.) The opinion of the United States Court of Appeals, Eleventh Circuit, reversing the District Court's order which denied Respondent's motion to dismiss a civil rights complaint filed by Petitioner against Respondent. Said opinion is predicated upon the premise that Petitioner's injuries attributed to Respondent amount to no more than a loss to reputation which is not a constitutionally protected area. That opinion is reported as Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985).

2.) The order of District Court rendered on November 29, 1984 which denied Respondent's motion to dismiss the civil rights complaint filed by Petitioner upon the ground that Respondent could not demonstrate that a cause of action could not be established against her. That opinion is unreported but appended hereto at App B.

II

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on November 15, 1985 (App A). A petition for re-hearing was denied on December 24, 1985 (App C). The jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1254(1).

III

STATUTORY PROVISIONS

Title 42 United States Code § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable shall be considered to be a statute of

the District of Columbia.

R.S. § 1979, Publ. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

IV

STATEMENT OF THE CASE

Under the provisions of Title 42 U.S.C. § 1983, Petitioner, GENE FLINN, a State of Florida legislator, filed a civil rights complaint against Respondent, ELAINE GORDON, likewise a State legislator, alleging, inter alia, that she conspired with other named defendants in a concerted effort to libel, slander, and otherwise defame him in the public eye in an effort to politically and socially humiliate and embarrass him.[1]

The complaint alleged that in an effort to discredit Petitioner and embarrass his family, Respondent conspired with

1. Petitioner and Respondent were political enemies primarily in opposition to each other as to matters of corruption in the securities field in the State of Florida. Such corruption is now rearing its head in the collapse of the nationally prominent ESM Government Securities scandal.

others by soliciting a current and a former female legislative aide to Petitioner to allege, inter alia, that Petitioner had made deviant sexual advances to them while they were in his service.[2] (App D).

The Complaint further alleged that as a result of the defamation, Petitioner's law practice (his livelihood) was diminished greatly and that his privacy right was infringed by Respondent's actions.

Respondent filed an answer and affirmative defenses which included the defense of good faith (App E). Subse-

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2. One legislative aide was subsequently indicted by a Leon County Grand Jury and convicted of perjury and later had a verdict and judgment rendered against her in favor of Petitioner in the Circuit Court of Dade County for libel and slander. Thereafter a Federal District Court jury found for Petitioner in a case which interragotory verdict related to the legislative aide. Prior to the actions against the aide, Petitioner was reprimanded by the Florida House.

quently, Respondent moved to dismiss the Complaint alleging that, as a State legislator, she possessed qualified immunity for her actions (App F). The District Court entered an Order on November 29, 1984 denying Respondent's motion to dismiss upon the ground that Respondent could not show that Petitioner could not establish his cause of action (App B). A notice of appeal was filed in the United States Court of Appeals for the Eleventh Circuit.

On November 15, 1985, the Eleventh Circuit rendered a decision reversing the District Court's order (App A). The Court opined that Petitioner had not shown the loss of a "clearly established" constitutional right so as to overcome Respondent's qualified immunity (App A). The Court reasoned that notwithstanding

Petitioner's claim of privacy and due process (property) violations, as the injury arose from a loss of reputation, the claim was not actionable under § 1983 pursuant to Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

V

ARGUMENT

This Court, in Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), ruled that a libel and/or slander by an officer of a state which injures reputation alone will not suffice so as to support an action against that officer for a civil rights violation.

Yet, this Court citing ample precedent opined that a stigma to reputation when coupled with an impairment to earn a living constitutes a 'property' right in the context of affording an individual due process. Paul v. Davis, supra, citing Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) and United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1251 (1946). Further, the Paul Court ruled that the

injury to reputation can also constitute an invasion of a 'privacy' right if such defamation related to such areas of "marriage, procreation, contraception, family relationships, and child rearing and education". Paul v. Davis at 424 U.S. 713, citing to Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) and Palkov v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

Clearly, while injury free reputation alone is not a constitutionally guaranteed right, injury to reputation which involves a violation of the right of privacy or when coupled with an impairment to earn a living does trigger the protection of the First and Fourteenth Amendments, respectively. A loss of such a "property right" or "right of privacy" is clearly sufficient to support a claim pursuant to Title 42

U.S.C. § 1983.

In a relatively recent decision, this Court set forth the test to be utilized in determining the propriety of a civil rights complaint against a State official who asserts a defense of good faith immunity. In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), this Court determined that government officials would be shielded from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Supra at 2738.

In sum, as set forth in Paul v. Davis, supra, it is clear that a civil rights complaint, when predicated upon defamatory remarks, must be coupled with something more (i.e. property right loss or privacy

violation) in order to satisfy the requirements of a constitutional right violation as set forth in Harlow, supra.

With the above in mind, the Eleventh Circuit both departed from the essential requirements of law and created conflict with at least two other Circuits in rendering its decision sub judice. In Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985), the Eleventh Circuit reversed the trial judge's Order denying a motion to dismiss filed by Respondent/GORDON which was predicated upon her claim for qualified privilege.

In rendering its decision the Eleventh Circuit opined as follows:

> "Flinn charges that Gordon, in violation of due process, (1) damaged his personal and political reputation, (2) diminished his personal and family privacy, and (3) deprived him of his position as a state legislator. After an

> examination of the complaint and applicable law, we find that none of these injuries constitute the loss of a federal right and, consequently, that no relief is available under § 1983. Since Flinn cannot show the loss of any federal right, much less the loss of a "clearly established" right, he has failed to overcome Gordon's qualified immunity." Supra at 686.

While the Eleventh Circuit Court recognized the established constitutional right to privacy it relied on its prior holding in Carroll v. Parks,[3] 755 F.2d 1455 (11th Cir. 1985) in determining that no privacy right had been violated. In Carroll, however, only injury to reputation was alleged.

Sub judice, a simple review of the

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3. In Carroll v. Parks, 755 F.2d 1455 (11th Cir. 1985), a high school year book showed a student's sexual organ exposed. The student unsuccessfully sued the school board under Title 42 U.S.C. 1983.

Complaint[4] filed by Petitioner/FLINN reveals that, inter alia, Respondent/GORDON conspired with others to politically embarrass, humiliate, and financially ruin FLINN and his family by holding a weekend press conference while Petitioner and his family were out of town and unavailable for response. Further, the pleading alleged that Respondent and others solicited the testimony of two former legislative aides of Petitioner to lend credence to the allegations of Respondent.[5]

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4. The trial Court has since allowed an amendment to reflect a claim against Respondent and others for Civil RICO. Further, said amended Complaint outlines in detail Respondent's actions in violating Petitioner's constitutional rights.
5. It is important to note that Respondent originally alleged that Petitioner violated State law by using his legislative aides for personal business. By the time the press conference ended FLINN was accused of deviant sexual behavior.

The press conference (referred to in the Complaint) (App D) falsely related that FLINN had sexually molested his legislative aides and had carried on deviant sexual behavior toward these female aides. The Complaint filed by FLINN alleged that Respondent had knowingly fabricated the allegations and that as a result of such defamation had suffered financially in that his law practice has greatly suffered and that his right of privacy had been violated by said false references to his sexual promiscuity and deviant behavior.

In Slayton v. Willingham, 726 F.2d 631 (10th Cir. 1984), the Tenth Circuit opined that the publication of private and sensitive photographs were more than mere damages to reputation and thus, a civil rights claim predicated upon a

violation of a right to privacy was improperly dismissed. Further, in Fadjo v. Coon, 633 F.2d 633 (5th Cir. 1981), a right of privacy claim was permitted to form the basis of a civil rights claim. The Fifth Circuit, relying on this Court's opinion in Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), held that the revealing of personal information relating to financial background was a sufficient area of privacy which would lend itself to a civil rights claim. Clearly, if financial information is satisfactory for constitutional purposes relating to privacy, the falsehoods relating to sexual behavior is more than appropriate as a basis for a privacy claim.

In conclusion, it is obvious that FLINN set forth more than mere damage to reputation when he claimed a due process

taking of his livelihood as a result of Respondent/GORDON'S defamation. On that ground, alone, a departure of the essential requirements of law was demonstrated. Further, and even more pronounced, was the departure as it related to the violation of FLINN'S right to privacy. The false accusations thrown to the press by Respondent were of such a sensitive, personal nature (and completely irrelevant to the original accusation by GORDON of misuse of legislative aides) as to be violative of FLINN'S right to privacy.

In refusing to recognize the constitutional basis for the filing of this Title 42 U.S.C. § 1983 Complaint, the Eleventh Circuit was in conflict with the Tenth and Fifth Circuit opinions referred to above and with this Honorable Court's prior holdings on civil rights

causes of action. Justice requires that Certiorari be granted and that the Eleventh Circuit's opinion be quashed and the cause remanded to the District Court (in compliance with that Court s original Order) and proceed to trial.

CONCLUSION

A cause of action was clearly established by FLINN in his Complaint for civil rights violation pursuant to Title 42 U.S.C. § 1983. Not only was FLINN'S right to due process violated vis-a-vis a taking of his property (livelihood) but a violation of his right to privacy was committed by the defamatory remarks of Respondent/GORDON. The Eleventh Circuit clearly is in conflict with other Circuits on the issue and departed from the essential requirements of law. Because of the conflict and importance of the questions presented, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted on this 21st day of February, 1986, at Miami, Dade County, Florida.

GENE FLINN, ESQ.

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APPENDIX A

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

No. 84-5964

GENE FLINN,

Plaintiff-Appellee,

v.

ELAINE GORDON,

Defendant-Appellant.

Nov. 15, 1985

Appeal from the United States District Court for the Southern District of Florida.

Before JOHNSON and HENDERSON, Circuit Judges, and ALLGOOD*, District Judge.

HENDERSON, Circuit Judge:

This 42 U.S.C. § 1983 case was initiated by the appellee, Gene Flinn, against the appellant, Elaine Gordon, and four other

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

defendants, in the United States District Court for the Southern District of Florida, to recover for damage to Flinn's political and personal reputation allegedly caused by the defendants' conduct. The district court denied Gordon's motion to dismiss the complaint and she appeals from that order. We find that the complaint fails to state a cause of action against Gordon and reverse the judgment of the district court.

Flinn was elected to the Florida House of Representatives in 1978. In early 1980, two of Flinn's legislative aides filed complaints with the Equal Employment Opportunity Commission charging Flinn with sexual harassment. The Florida House of Representatives appointed a Select Committee to investigate these charges. This committee recommended

that the full House reprimand Flinn. The House accepted this recommendation and voted to publicly reprimand Flinn. Flinn was defeated in his 1980 bid for re-election.

In 1984 Flinn filed this § 1983 suit against two former aides, another legislative employee, the candidate who defeated him in the 1980 elections, and Gordon. At the time of the proceedings against Flinn in the House of Representatives, Gordon was the chairperson of the House Administration Committee, which supervises employment matters in that legislative body. The complaint alleges that Gordon damaged Flinn's personal and political reputation and also caused him to lose the 1980 election by (1) abrogating her duty as House Administration Committee chairperson to resolve personnel problems in Flinn's

office and (2) conspiring with the other defendants to release slanderous accusations of sexual misconduct by Flinn to the news media. Gordon moved to dismiss the complaint against her because of her qualified immunity as a public official.

[1,2] The threshold issue is the jurisdiction of this court to entertain this appeal. Unless an issue is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292, a federal appellate court has jurisdiction to review only final decisions of district court. 28 U.S.C. § 1291. The district court's denial of Gordon's motion to dismiss did not constitute the final judgment in this case and the issue upon which the motion was based has not been certified for an interlocutory appeal. Gordon contends that the denial of her qualified immunity

defense can be appealed as a collateral order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The Supreme Court recently resolved this question in Mitchell v. Forsyth, ____ U.S. ____, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), holding that denials of qualified immunity claims are appealable collateral orders under the Cohen doctrine. The Court noted that the qualified immunity defense is designed to prevent unfounded suits against public officials as well as liability. The Court then held that the right to bring an immediate appeal from the denial of the defense was essential to prevent such unwarranted court actions: "[W]e hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law,

is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 105 S.Ct. at 2817, 86 L.Ed.2d at 427. Gordon's appeal, therefore, is properly before this court.

As stated earlier, Gordon asserted as the basis of her motion to dismiss that the complaint failed to state a cause of action against her because of her qualified immunity as a public official precludes liability under the facts alleged by Flinn. Accordingly, she contends that the district court erred in refusing to dismiss the complaint under Fed.R.Civ.P. 12(b)(6).

While Gordon would be able to claim absolute immunity from liability if her acts were taken in her legislative capacity, Lake Country Estates, Inc. v.

Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979); Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that issue is not before us in this appeal. The motion to dismiss was premised on Gordon's qualified immunity as a government official, not on any absolute immunity she might possess as a legislator. This avoids the need to inquire at this point whether her House personnel duties were legislative or administrative in nature. See Cole v. Gray, 639 F.2d 804, 811 (5th Cir. 1981), cert. denied, 454 U.S. 838, 102 S.Ct. 144, 70 L.Ed.2d 120 (1981);[1] Three Rivers Cablevision, Inc. City of Pittsburgh, 502 F.Supp. 1118, 1135-36 (W.D.Pa. 1980).

1. In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981)(en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

The qualified immunity for public officials was established in its present form in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). See also Davis v. Scherer, ____ U.S. _____, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984); Zeigler v. Jackson, 716 F.2d 847 (11th Cir. 1983). In Harlow the Supreme Court established a purely objective test for qualified immunity, holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410.

[3] In order to benefit from this Harlow qualified immunity, the official must demon-

strate "that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." Zeigler, 716 F.2d at 849. Once this is established, the official is immune from liability unless the plaintiff can "prove that the defendant's actions violated clearly established constitutional law." Id.

[4] All of the alleged acts of misconduct by Gordon involved malfeasance and nonfeasance in handling personnel matters in the Florida House of Representatives. See Record on Appeal, pp 2, 3, 9, 10. Thus it is clear that she acted within the scope of her discretionary authority as chairperson of the House Administration Committee when she performed these duties. As such, she is immune from liability for these acts unless they violated "clearly established statutory or constitutional

rights of which a reasonable person would have known."

Flinn charges that Gordon, in violation of due process, (1) damaged his personal and politicial reputation, (2) diminished his personal and family privacy, and (3) deprived him of his position as a state legislator. After an examination of the complaint and applicable law, we find that none of these injuries constitute the loss of a federal right and, consequently, that no relief is available under § 1983. Since Flinn cannot show the loss of any federal right, much less the loss of a "clearly established" right, he has failed to overcome Gordon's qualified immunity.

[5] The claim for damage to his reputation is precluded by the decision of the Supreme Court in Paul v. Davis 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), that injury to

reputation alone is not actionable under § 1983. The Court indicated that injury to reputation coupled with the loss of another interest, such as continued government employment, might be actionable under § 1983. 424 U.S. at 705-07, 96 S.Ct. at 1162-63, 47 L.Ed.2d at 416-17. The facts as alleged do not present such a situation here. Gordon may have injured Flinn's reputation, but she did not remove him from his legislative office. That decision was made by Flinn's constituents during the 1980 elections.

The contention that Gordon's activities inteferred with a fundamental right to personal privacy and family relations must meet a similar fate. It is true that in a long line of cases the Supreme Court has accorded constitutional protection to the right of personal and family privacy. See,

e.g., Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). However, a recent decision of this court held that this constitutional right to personal and family privacy does not protect one from the sort of injury to reputation referred to in Flinn's complaint. In Carroll v. Parks, 755 F.2d 1455, 1456 (11th Cir. 1985), this court expressly refused "to find within the zones of privacy protected by the Constitution the right to be free from public embarrassment or damage to reputation."

As a final allegation, Flinn urges that he had a constitutional right to continued employment as a state legislator. Flinn

was not removed from office during the term to which he was elected, but was voted out of office during the 1980 Florida elections. Although he certainly had a constitutional right to run for office and to hold office once elected, he had no constitutional right to win an election. This was a political decision for the Florida electorate. See Gordon v. Leatherman, 450 F.2d 562, 567 (5th Cir. 1971). "[T]here is a fundamental difference between the explusion or removal of a public official by the state and that same activity by the voters.... Any governmental body is required to act fairly, but that is not true as to a voter. Insofar as the United States Constitution is concerned, an elector may vote for a good reason, a bad reason, or for no reason whatsoever."

In summary, Flinn has failed to allege

any act for which he would be entitled to relief under § 1983. Consequently, he cannot show the violation of any clearly established constitutional or statutory right. Gordon's good faith immunity remains intact and Flinn's complaint against her must be dismissed.

The judgment of the district court denying Gordon's motion to dismiss is REVERSED and the case is REMANDED to the district court with directions to dismiss the action against Gordon. Flinn's motion for attorney's fees is DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-0014 Civ-EBD

GENE FLINN,

Plaintiff,

vs.

ELAINE GORDON, et al.,

Defendants.
_____/

ORDER DENYING DEFENDANT GORDON'S AND KEMPEL'S MOTIONS TO DISMISS

THIS MATTER has come before the Court upon Defendants GORDON'S and KEMPEL'S Motions to Dismiss. After careful consideration of their briefs, and in light of the entire record in this cause, it is

ORDERED AND ADJUDGED that the motions are DENIED. Defendants GORDON and KEMPEL have not demonstrated that Plaintiff can prove no set of facts in support of his claim.

DONE AND ORDERED this 29th day of November, 1984.

/s/ Edward B. Davis

UNITED STATES DISTRICT JUDGE

cc: James Sloan, Esq.
Gene Flinn, Esq.
Andy Moriber, Esq.
Ronald Ravikoff, Esq.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-5964

GENE FLINN,

Plaintiff-Appellee,

versus

ELAINE GORDON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(December 24, 1986)

BEFORE: JOHNSON and HENDERSON, Circuit Judges and ALLGOOD*, District Judge

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*Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The petition(s) for rehearing filed by appellee Gene Flinn is denied.

ENTERED FOR THE COURT:

/s/ Albert J. Henderson

United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA

CIVIL DIVISION

CASE NO. 80-0014 CIV-EBD

GENE FLINN,

Plaintiff,

vs.

ELAINE GORDON, DEXTER LEHTINEN, MARGARET KEMPEL, KAREN SHIELDS, and VIRGINIA CATHCART

Defendants.
_____/

COMPLAINT FOR CONSPIRACY TO VIOLATE CIVIL RIGHTS

COMES NOW GENE FLINN, in proper person, and sues ELAINE GORDON, DEXTER LEHTINEN, MARGARET KEMPEL, KAREN SHIELDS, and VIRGINIA CARTHCART and alleges:

1. This is an action under Title 42 U.S.C. Section 1983 for violation of civil rights.

2. Plaintiff, GENE FLINN, was at all times material hereto a citizen of the United States, resident of the State of Florida and Florida State Legislator representing the former One Hundred Sixteenth District prior to reapportionment in Dade County, Florida.

3. The Defendants were at all times material hereto, except as to SHIELDS and CATHCART, as follows:

A) ELAINE GORDON was, at the time, and still is, a State Representative and former Chairperson of the House Administration Committee.

B) DEXTER LEHTINEN was a former political opponent in '79 and hopeful for Plaintiff's legislative seat in 1980 and is a State Representative.

C) MARGARET KEMPEL was Executive Director to the Dade Delegation, presently, allegedly, a campaign coordinator.

D) KAREN SHIELDS is not a citizen of the United States and was a State Legislative Aide to Plaintiff and resides in Mount Dora, Florida.

E) VIRGINIA CATHCART was a State Legislative Aide to Plaintiff and whose last known verified address is 1511 North Puente Avenue, Apartment 53, Baldwin Park, California.

4. That on September 10, 1979 and November 29, 1979, respectively, VIRGINIA CATHCART and KAREN SHIELDS applied for a position with the State of Florida, through House Administration, as legislative aides to Plaintiff. Both were terminated by the Plaintiff thereafter and approved by ELAINE GORDON to draw unemployment compensation.

5. That ELAINE GORDON, acting as Chairperson of the House Administration Committee, approved each application and

likewise approved "an overlap" permitting the employment of KAREN SHIELDS and VIRGINIA CATHCART to run concurrent in early December of 1979, at the Plaintiff's legislative office in Miami, Florida.

6. That both legislative applications of KAREN SHIELDS and VIRGINIA CATHCART and changes thereto, including a substitution of a "new" Loyalty Oath executed by KAREN SHIELDS on January 14, 1980, were personally approved by ELAINE GORDON. Further, these applications contained false and fraudulent statements by both co-defendants and in the case of KAREN SHIELDS was fraudulent in all material respects which led to her indictment for perjury by a Leon County Grand Jury in September, 1980, approximately five (5) months after the Select Committee hearings were concluded and the Plaintiff's rights had been abridged. Accordingly,

ELAINE GORDON failed and/or refused to investigate or disclose any discrepancies turned up by the Personnel Office of House Administration to the House members, or to the Select Committee, or to the media, and/or to the Member under fire, (incorporation by reference is made to U.S. District Case No. 83-1352 Civ-JWK) as was her duty prior to approval of said applications, or subsequently while she held her chairmanship, and while the Plaintiff was a member of the legislature, seeking re-election, to wit:

KAREN SHIELDS

A) Her date of birth and age were falsified on her application, to wit, May, 1953, instead of May 2, 1957, and her age of 26 was therein false. Her true age on that date was 22.

B) She did not hold a Master's Degree from world-renown Oxford University

in England or even an undergraduate degree from any college or university, whether in America or abroad; in fact, she was not even a high school graduate.

C) There was no registration of the teaching certificate number "OSOX1931", in England. It is fraudulent.

D) She intentionally omitted two places of employment on her legislative application. As simple check by ELAINE GORDON by virtue of running her Social Security number through would have revealed a long gap in her employment work record:

1) State Bank of Apopka, Apopka, Florida, where she was fired for allegedly diverting bank funds. She, thereupon, claimed sexual harassment by her male super-

visor.

2) Florida National Bank in Orlando, Florida, where she had omitted her previous places of employment, including the Bank of Apopka, where, again, she was fired. She, again, claimed she was sexually harassed.

E) She was fired from a position with the Department of Corrections of the State of Florida by her male supervisor for doing "poor work", and he recommended that she not be rehired by the State of Florida. Further, this letter is "missing" from the files in an alleged attempt to cover-up.

F) She issued bad checks for which she had been sued in the County Court, in and for the Second Judicial Circuit, County of Leon, State of Florida,(Case No. 80-3039 SP).

G) She stole from the Plaintiff.

H) She accused Charles Carter of Mount Dora of sexual harassment. Further, he had testified that SHIELDS had had an abortion from sleeping with her step-father's boss who works at Lake Correctional Institute.

I) She was discovered to possess controlled substances.

J) She committed a Watergate-style break-in at the Plaintiff's office on a week-end while the office was closed and the regular staff gaine, acting in concert with former terminated aide, VIRGINIA CATHCART, forging documents for use by a Select Committee which had not even been contemplated.

VIRGINIA CATHCART

K) She never held the position of office manager.

L) She fraudulently listed three (3) years of college on her application in

order to qualify for a higher classification and starting salary with the State of Florida.

M) She was a party to a bigamist relationship.

N) She stole from the Plaintiff.

O) She omitted prior employment where she had been terminated or other told to get out.

P) She committed a Watergate-style break-in at the Plaintiff's office after being fired by the Plaintiff and no longer being employed by the State of Florida.

Q) She did, while in the employ as Legislative Aide and while the Plaintiff was away, without authorization from the Plaintiff herein, fire a Hispanic legislative aide employed by the Plaintiff in the Plaintiff's office, to wit, Mr. Victor Rams, who was subsequently returned to service at the firm of Flinn & Jennings, P.A., and

thereafter, employed by Paul & Thompson, P.A.

7. That commencing sometime in December, 1979, and continuing thereafter, the Defendants conspired, confederated, and came to a tacit understanding and agreement to undermind Plaintiff's wife and office staff's influence; his dignity of demeanor with his law partner, attorney of counsel, and the other secretaries in the office, and further, through the aiding and abetting of GORDON, KEMPEL, and political hopeful, DEXTER LEHTINEN, to attack the only one in the firm who was the Chief Executive Officer and the only "public figure" in retaliating response to the other members of the regular staff, and thereby violated Plaintiff's civil rights, through misleading members of the media, press corps in Tallahassee and the two major wire services, and further, to the Plaintiff's colleagues on the floor.

8. In particular, Defendants, VIRGINIA CATHCART and KAREN SHIELDS, while employed as legislative aides to Plaintiff, did agree and conspire to undertake a course of action, the cbject of which was to make libelous and/or slanderous and defamatory statements with the malicious intent to ruin the Plaintiff and everyone associated with him. Further, these statements were intentionally contrived, with help, so as to injure, defame, embarrass, and humiliate the Plaintiff, his wife, children, law partner, and staff, both legal and legislative, with whom they had frequent run-ins and personality clashes, in and out of the office, as to create a complete disruption of normal procedures and did perpetrate violence and made threats in and out of the office.

9. That MARGARET KEMPEL, as Executive Director of the Dade Delegation Office, and

a close confident of both KAREN SHIELDS and VIRGINIA CATHCART, offered to provide, and did provide, aid, counsel, and assistance to KAREN SHIELDS and VIRGINIA CATHCART in furtherance of their plot to violate Plaintiff's right through confederating with ELAINE GORDON and would-be political opponent, DEXTER LEHTINEN.

10. That DEXTER LEHTINEN, who had been an announced candidate against Plaintiff, had commenced a "social relationship: with VIRGINIA CATHCART, with whom KAREN SHIELDS was living, as a means of supporting and advising the conspiracy for personal political gain.

11. That further, MARGARET KEMPEL, viewed Plaintiff's political demise and replacement with LEHTINEN as a goal to be obtained after Plaintiff's various warnings to MARGARET KEMPEL, including but not

limited to, responding to letters seeking information on his political positions, which did not reflect his views or that of his constituency.

12. That KEMPEL, GORDON, and LEHTINEN were holding meetings, together with those known and unknown, with respect to the conservative democrat, GENE FLINN, in violation of the "Sunshine Law".

13. That a "hasty" press conference was called at KEMPEL'S apartment on a Saturday night and was attended by a reporter and photographer from The Miami Herald for a "so-called breaking story", where VIRGINIA CATHCART and KAREN SHIELDS were present, without warning to or any prior knowledge of the Plaintiff herein, or that of his regular staff. Further, CATHCART and SHIELDS did libel and slander the Plaintiff, which statements appeared in print in

The Miami Herald, the Tallahassee Democrat, and elsewhere.

14. That the true purpose of this "so-called" news conference, however, was to circumvent the press' ability to check fully the allegations prior to publishing the story and prohibit the press from contacting the unaware Plaintiff prior to the story's deadline publication time with respect to a malicious character assassination.

15. That at the "press conference", SHIELDS and CATHCART alleged libelous and slanderous remarks concerning the behavior of Plaintiff which in the case of KAREN SHIELDS has since been established as libelous and slanderous and were willfully and wantonly made. (Circuit Court Case No. 80-11810, in the Eleventh Judicial Circuit, in and for Dade County, Florida).

16. That as a further evidence of the

conspiracy, KEMPEL failed to inform the other members of the Dade County legislative community of her actions and further failed to notify Plaintiff, to whom KEMPEL had an obligation and duty, as Plaintiff was a member of the Dade County Delegation at the time, of the course of action surreptitiously undertaken in joint concert with LEHTINEN and GORDON.

17. That in furtherance of the conspiracy with actual malice and with reckless disregard for the truth, ELAINE GORDON did cause to be published in the Sunday, January 6, 1980, edition of The Miami Herald, a letter purportedly sent to Representative GENE FLINN which was later admitted by her in testimony, given under oath, before the Select Committee, to be from an unknown and/or unsubstantiated source, which copy she stated she had instructed the Executive Director of House

Administration, Mrs. Balthaser, to remove from the official files.

18. That neither ELAINE GORDON, MARGARET KEMPEL nor DEXTER LEHTINEN had contacted any of the Plaintiff's regular staff members to question them concerning either Plaintiff's conduct or their knowledge of the behavior and work habits of CATHCART and SHIELDS. Further, there was no contact made with any law enforcement agency to conduct any investigation with respect to the charges being made by CATHCART and SHIELDS.

19. That subsequent to the publication of these baseless allegations, Plaintiff was reprimanded by the House of Representatives, which led to his ultimate defeat at the polls by DEXTER LEHTINEN in the run-off election held in 1980, and, again, in the run-off election in 1982 by LEHTINEN'S law partner, Tim Murphy.

20. That prior to and during the hearing, GORDON had failed and/or refused to investigate and/or refused to divulge those discrepancies already noted in their respective personnel files in Tallahassee of CATHCART and SHIELDS and/or intentionally failed to bring to the House's attention CATHCART'S and SHIELDS' previous employment records and falsehoods in their applications for employment.

21/ That under color of State authority, GORDON, LEHTINEN, KEMPEL, CATHCART, and SHIELDS culminated their conspiracy to violate Plaintiff's civil rights by having the House reprimand Plaintiff for his actions, knowing them to be false.

22. As a direct and proximate result of their actions, Plaintiff has been permanently damaged in the media and otherwise as a result thereof which has caused him to lose two

run-off elections since; has been libeled and slandered by one or more of the conspirators, and has faced unjustified embarrassment and unnecessary humiliation, as well as his wife, children, and both his legislative and legal staffs, and has had his civil rights to hold public office damaged.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, for damages, costs, attorney's fees, and such other relief as this Court deems proper, and demands a jury trial on all issues.

DATED at Miami, Dade County, Florida, this 4th day of January, 1984.

LAW OFFICES OF GENE FLINN, P.A.
201 McCormick Building
111 Southwest Third Street
Miami, Florida 33130
Telephone: (305) 371-0386

By /s/ GENE FLINN
GENE FLINN

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

GENE FLINN,

Plaintiff,

vs. CASE NO. 84-0014-CIV-DAVIS

ELAINE GORDON,
et al.,

Defendants.
_____/

ANSWER OF DEFENDANT ELAINE GORDON

COMES NOW Defendant Elaine Gordon, through her undersigned counsel, and answers the Complaint in sequence corresponding to each numbered or lettered allegation, as follows:

1. Admitted only that Plaintiff alleges that he brings the action under 42 U.S.C. section 1983; denied that any violation of his civil rights has occurred.

2. Without knowledge as to Plaintiff's citizenship or residency; admitted that he

was a Florida legislator representing the former One-Hundred Sixteenth District prior to reapportionment.

3. A) Admitted.

B) Admitted.

C) Admitted that Margaret Kempel was the Delegation Coordinator of the Dade County Legislative Delegation; to the best of Defendant Gordon's knowledge; Margaret Kempel is not presently a campaign co-ordinator, allegedly or otherwise.

D) Admitted that Karen Shields was a State Legislative Aide to Plaintiff; without knowledge to remainder of that allegation.

E) Admitted that Virginia Cathcart was a State Legislative Aide to Plaintiff; without knowledge to remainder of that allegation.

4. Admitted as to the first

sentence. Denied that Virginia Cathcart and Karen Shields both "were terminated by the Plaintiff thereafter", and denied that they were approved by Elaine Gordon to draw unemployment compensation.

5. Denied that Defendant Gordon approved each application; admitted that her approval was necessary, and given, for an over-lap of employment of two legislati aides.

6. Denied as to all allegations except that it is admitted only that Karen Shields was indicted, approximately five months after the Select Committee Hearings were concluded, for falsifying her employment application.

A) Without knowledge.

B) Without knowledge.

C) Without knowledge.

D) Without knowledge.

E) Without knowledge.

F) Without knowledge.

G) Without knowledge.

H) Without knowledge.

I) Without knowledge.

J) Without knowledge.

K) Without knowledge.

L) Without knowledge.

M) Without knowledge.

N) Without knowledge.

O) Without knowledge.

P) Without knowledge.

Q) Without knowledge.

7. Denied.

8. Without knowledge.

9. Denied.

10. Without knowledge.

11. Without knowledge.

12. Denied.

13. Without knowledge.

14. Without knowledge.

15. Without knowledge.

16. Denied.

17. Denied except that Defendant Gordon admits she had instructed Ms. Balthaser to remove a letter from House Administration files.

18. Admitted as to the first sentence; without knowledge as to the second sentence.

19. Admitted only that Plaintiff was reprimanded by the House of Representatives and that he was subsequently defeated by Dexter Lehtinen and thereafter by Tim Murphy; without knowledge as to the remainder.

20. This compound allegation, as stated, is denied.

21. Denied.

22. Denied.

AFFIRMATIVE DEFENSES

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. The Court is without jurisdiction over this cause.

3. Defendant Gordon is immune from suit by virtue of the qualified immunity afforded to officers, agents, or employees of a state for any action taken in good faith; Defendant Gordon asserts that all actions taken by her in this cause were taken in good faith and in accordance with the Constitution and laws of the United States and of the State of Florida.

4. Defendant Gordon is immune from suit by virtue of the absolute immunity afforded to any member of the Legislature acting in a legislative capacity.

5. Plaintiff's cause of action is barred by the statute of limitations.

6. Plaintiff's cause of action is barred by the doctrines of res judicata and collateral estoppel.

Therefore, having answered the allegations of Plaintiff's Complaint, Defendant Gordon demands a trial by jury, requests that judgment be granted in her favor, and requests costs and attorney's fees for the defense of this action.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

/s/ James W. Sloan

James W. Sloan
Assistant Attorney General
Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488 1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to GENE FLINN, 201 McCormick Building, 111 Southwest Third Street, Miami, Florida 33130; ANDREW H. MORIBER, 1000 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; RONALD RAVIKOFF, Gables International Plaza, 2665 LeJenue[sic] Road, Coral Gables, Florida 33134, this 6th day of December, 1984.

/s/ James W. Sloan
James W. Sloan
Assistant Attorney General

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-0014 Civ-EBD

GENE FLINN,

Plaintiff,

vs.

ELAINE GORDON,
DEXTER LEHTINEN,
MARGET KEMPEL,
KAREN SHEILDS[sic].
and VIRGINIA CATHCART,

Defendants.
_____/

DEFENDANT GORDON'S MOTION TO DISMISS

Comes now Defendant, Representative Elaine Gordon, Florida House of Representatives, through her undersigned counsel, and moves this Court to dismiss this cause pursuant to Rule 12(b)(6). Fed.R.Civ.P., and as grounds therefor Defendant Gordon would show that the Plaintiff has failed to state a claim upon which relief can be granted.

MEMORANDUM OF LAW

The allegations of the Complaint as to the supposed injury done to the Plaintiff are:

Paragraph 21, that Plaintiff's civil rights were violated when he was reprimanded by the Florida House of Representatives; and Paragraph 22, that he "has been permanently damaged in the media and otherwise . . . which has caused him to loss [sic] two run-off elections since; has been libeled and slandered by one or more of the conspirators, and has faced unjustified embarrassment and unnecessary humiliation . . . and has had his civil rights to hold public office damaged."[sic]

It is submitted that Plaintiff has utterly failed to state any cause of action cognizable under Title 42 United States Code §1983. Libel and slander,

even if proven, are not constitutional causes of action; defamation, without more, does not state a claim for relief under §1983. Paul v. Davis, 424 U.S. 693 (1976). As to Plaintiff's allegation that he "has had his civil rights to hold public office damaged", it is difficult to cite authority to counter this proposition, because it is dubious that such a spurious contention has ever risen to the dignity of being included in the Federal Reporter System.

Assuming however, arguendo, that Plaintiff's allegations are true for the purposes of this motion, as must be assumed in a motion to dismiss, Defendant Gordon submits that she is immune from suit on the basis of qualified immunity afforded to public officials by a line of Supreme Court decisions which include

Butz v. Economou, 438 U.S. 478 (1970); Scheuer v. Rhodes, 416 U.S. 232 (1974); and Harlow v. Fitzgerald, ____ U.S. ____, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1983). In Harlow, the Supreme Court held that:

> government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citations omitted]

73 L.Ed.2d at 410.

In reaching its decision in Harlow, the Supreme Court quoted its opinion in Butz v. Economoum supra, which reflected "the need to protect officials who are required to exercise their discretion and the related public interest encouraging the vigorous exercise of official authority."

438 U.S. 478, 506. The Court reiterated that its holding in Butz "emphasized our expectation that insubstantial suits need not proceed to trial," [sic] and further quoted from its opinion in Butz supporting that expression of the Court's expectation:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibility of artful pleading. Unless the complaint states a compensable claim for relief . . . it should not survive a motion to dismiss. Moreover, the Court recognized in Sheuer[sic] that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . 438 U.S. at 507 - 508.

73 L.Ed.2d at 404.

This action is an insubstantial lawsuit as contemplated by Butz and Harlow. Plaintiff has stated no claim upon which relief can be granted; and it can not be

imagined that any action on the part of Representative Gordon as alleged could be found to have violated clearly established United States statutory or constitutional rights of which a reasonable person would have known. Defendant Gordon, therefore, submits that Plaintiff can prove no set facts in support of his claim for the eminently simple reason that he has no claim upon which relief can be granted in this form.

Defendant Gordon would further submit that Plaintiff has alleged no jurisdictional base for his complaint. Therefore, for the foregoing reasons, Defendant Gordon respectfully moves this Court to dismiss this cause.

Respectfully submitted,

Jim Smith
Attorney General

/s/ James A. Peters for

James W. Sloan
Assistant Attorney General

Department of Legal Affairs
The Capitol, Suite 1502
Tallahassee, Florida 32301
(904) 488-9935

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Gordon's Motion to Dismiss has been furnished by U. S. Mail to Gene Flinn, 201 McCormick Building, 111 Southwest Third Street, Miami, Florida 33130; Andrew W. Moriber, 1000 Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; Ronald Raviff, Gables International Plaza, 2665 LeJenue[sic] Road, Coral Gables, Florida 33134; this 11 day of June, 1984.

/s/ James A. Peters for
James W. Sloan